

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

AMBER COLVILLE, *et al.*,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity
as Secretary of Health and Human Services,
et al.,

Defendants.

Civil Action No. 1:22-cv-00113-HSO-RPM

**DEFENDANTS' RESPONSE TO PLAINTIFFS' NOTICE OF SUPPLEMENTAL
AUTHORITIES**

Defendants respond to Plaintiffs' notice of supplemental authorities, ECF No. 133, which draws the Court's attention to *Wages & White Lion Invs. v. FDA*, 90 F.4th 357 (5th Cir. 2024) and *Chamber of Com. v. SEC*, 88 F.4th 1115 (5th Cir. 2023). In neither case did the Fifth Circuit address Defendants' argument that the Administrative Procedure Act does not authorize vacatur. Neither decision cites *United States v. Texas*, 143 S. Ct. 1964 (2023), much less Justice Gorsuch's opinion that there are "serious" arguments that "warrant careful consideration" as to whether the APA "empowers courts to vacate agency action." It is well established that the Fifth Circuit's "assumption"—here, that the APA permits universal vacatur—"is not binding if the adverse party did not challenge and [the court] did not consider" that issue." *Ochoa-Salgado v. Garland*, 5 F.4th 615, 619 (5th Cir. 2021) (collecting cases).

In any event, the mere availability of vacatur would not compel the Court to grant that remedy here. Instead, if this Court grants Plaintiffs any relief (and it should not for the reasons set forth in Defendants' prior briefing), it should remand without vacatur because both conditions

justifying remand without vacatur—disruptive consequences and the agency’s ability to remedy any legal flaw that the Court might identify—are present here. Defs.’ Mem. in Supp. of Cross Mot. for Summ. J., at 24-25, ECF No. 91; Defs.’ Rebuttal, at 14-15, ECF No. 122.

Dated: March 12, 2024

Respectfully submitted,

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